COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 050358-01 050561-01**

Julio Martinez	Employee
Northbound Train, Inc.	Employer
Workers' Compensation Trust Fund	Insurer
Eastern Casualty Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Levine[1])

APPEARANCES
George A. Ramirez, Esq., for the employee
Judith A. Atkinson, Esq., for the Workers' Compensation Trust Fund
Frank L. McNamara, Jr., Esq., for Eastern Casualty at hearing and on appeal
Kerry G. Nero, Esq., for Eastern Casualty on appeal

COSTIGAN, J. The Workers' Compensation Trust Fund (Trust Fund) appeals from a decision holding it liable, under G. L. c. 152, § 65(2),[2] for an industrial accident which occurred after Eastern Casualty (the insurer) claims it cancelled the employer's policy of workers' compensation insurance. The Trust Fund maintains that the insurer failed to meet the statutory requirements for cancelling the policy because the employer did not actually receive notice, and because the notice mailed was not clear and unambiguous. Therefore, the Trust Fund contends, the insurer remained on the risk. We disagree, and affirm the

[1] Judge Levine no longer serves on the reviewing board.

[2] Section 65(2), as most recently amended by St. 1998, c. 161, §§ 541 and 542, provides in pertinent part:

> There is hereby established a trust fund in the state treasury, known as the Workers' Compensation Trust Fund, the proceeds of which shall be used to pay or reimburse the following compensation: . . . (e) payment of benefits resulting from approved claims against employers subject to the personal jurisdiction of the commonwealth who are uninsured in violation of this chapter . . . .

judge's decision that the insurer properly cancelled its policy of workers' compensation insurance with the employer prior to the date of injury.

The Trust Fund also argues that the administrative judge erred in finding ongoing incapacity causally related to the employee's industrial injury under G. L. c. 152, § 1(7A). We agree and vacate that award of benefits, as of the August 12, 2002 date of the § 11A impartial medical examination.

The Judge's Subsidiary Findings of Fact

Julio Martinez, who was forty-nine years old at the time of the hearing, has a high school diploma and a certificate in carpentry from his native Colombia. He emigrated to the United States in 1996, and began working for the employer as a line cook in 1998. On November 11, 2001,[3] he injured his right knee while lifting a heavy box at work. (Dec. 5.) He was out of work for almost a month, during which time the employer paid him his full salary. He was back at work from December 7 until December 29, 2001. He has not worked since then. (Dec. 6.) On March 29, 2002, the employee had surgery to repair a torn medial meniscus of the right knee. (Dec. 5.) Some seventeen years earlier, in 1985, Mr. Martinez underwent surgery in Colombia on the same knee to reconstruct the anterior cruciate ligament, but received no subsequent treatment for that injury. (Dec. 5-6.)

Citing his November 11, 2001 knee injury, the employee filed a claim against the Workers' Compensation Trust Fund, and the Trust Fund moved to join the insurer. The administrative judge allowed the motion but following a § 10A conference, he filed a denial of the claim in favor of the insurer. The judge ordered the Trust Fund to pay ongoing weekly § 34 temporary total incapacity benefits, from December 29, 2001. The Trust Fund appealed that order, and the employee appealed the denial filed in favor of the insurer. The cross-appeals brought the employee's claim to a hearing de novo. (Dec. 2-3.)

[3] In his decision, the judge twice refers to an injury date of November 11, 2002. (Dec. 5, 6.) These appear to be scrivener's errors, as the employee was in fact injured in 2001. (Dec. 4, 17; Statutory Ex., Report of Dr. Bienkowski dated August 12, 2002.)

On August 12, 2002, Dr. Daniel W. Bienkowski examined the employee pursuant to § 11A. None of the parties deposed the doctor or moved to submit additional medical evidence. Sua sponte, the judge requested that the parties submit such evidence for the so-called "gap" period prior to Dr. Bienkowski's examination. Only the employee submitted additional medicals -- a report and note from his orthopedic surgeon, Dr. Timothy Foster, both written in the spring of 2002. (Dec. 4, 7-8.)

The judge adopted Dr. Bienkowski's multiple diagnoses: 1) acute displaced bucket handle tear medial meniscus right knee; 2) lateral meniscal tear; 3) old anterior cruciate ligament tear; 4) status post ACL reconstruction; 5) patellar arthrosis; and 6) medial and lateral joint arthritis. He also adopted the doctor's opinion that only the medial meniscal tear was causally related to the employee's 2001 work accident, and that the other diagnoses were related to the employee's prior anterior cruciate ligament tear and surgery. (Dec. 6-7.) He further adopted Dr. Bienkowski's opinion that, at the time of examination, Mr. Martinez was unable to stand or walk for more than an hour at a time, was unable to lift or climb stairs repeatedly, and could not squat or kneel. Dr. Bienkowski opined that the employee was partially disabled. (Dec. 7.)

As to the "gap" period prior to the impartial medical examination, the judge noted the opinion of the employee's treating orthopedic surgeon, Dr. Timothy Foster, that as of April 4, 2002, the employee was "currently totally disabled from his usual occupation," with eventual but not current ability to tolerate a sedentary job. (Dec. 8; Employee Ex. 2.) On May 28, 2002, Dr. Foster issued a note stating that the employee was to be "out of work until further evaluation on June 28, 2002." (Dec. 8; Employee Ex. 3.) The judge expressly credited the employee's testimony that his right knee pain at the time of the hearing in January 2003 was the same as when he was examined by Dr. Bienkowski in August 2002. (Dec. 6.) The judge also credited the employee's testimony that he feels pain whenever he puts all of his body weight on his right knee, that he experiences intense pain when

going down stairs, and that the knee bothers him when he sits for a long period of time. (Id.) Based on that credited testimony, as well as his consideration of the employee's age, education, vocational experience, native language (Spanish), and physical restrictions, the judge found the employee totally incapacitated from and after December 29, 2001, as a result of his November 11, 2001 injury. (Dec. 7-8.)

The Cancellation Issue

Whether the insurer complied with the appropriate statutory requirements for cancelling the employer's policy of workers' compensation insurance, effective October 12, 2001, depends in the first instance on whether the policy was a voluntary policy, or an "assigned risk" policy issued pursuant to § 65A of c. 152. Although the judge made no specific finding, two of the parties state in their briefs that the policy was a voluntary one, (Trust Fund br. 21, n.2; Insurer br. 3), and an underwriting manager for the insurer so testified. (May 2, 2003 Tr. 61.) Moreover, two of the parties agreed that G. L. c. 175, § 187C, governed the cancellation requirements insofar as notice to the employer was required. (Dec. 10; Employee br. 11; Insurer br. 15.) That statute provides, in relevant part:

> A company issuing any policy of insurance which is subject to cancellation by the company shall effect cancellation by serving the notice thereof provided by the policy and by paying or tendering, except as provided in this and the following section, the full return premium due thereunder in accordance with its terms without any deductions. Such notice and return premium, if any, shall be delivered in hand to the named insured, or left at his last address as shown by the company's records or, if its records contain no such address, at his last business, residence or other address known to the company, *or be forwarded to said address by first class mail, postage prepaid, and a notice left or forwarded, as aforesaid, shall be deemed a sufficient notice. No written notice of cancellation shall be deemed effective when mailed by the company unless the company obtains a certificate of mailing receipt from the United States Postal Service showing the name and address of the insured stated in the policy*. A check of the company or its duly authorized agent shall be deemed a sufficient tender. The affidavit of any officer, agent or employee of the company, duly authorized for that purpose, that such notice has been served and such return premium, if any, has been paid or tendered, as provided in this

> section, shall be prima facie evidence that cancellation has been duly effected.

As amended by St. 1990, c. 287, § 2. (Emphasis added.)

The judge made the following findings regarding the insurer's efforts to cancel the employer's policy:

> Eastern Casualty had provided workers' compensation insurance to Northbound Train . . . at least since 1999. On a number of occasions thereafter Eastern sent the insured forms entitled "Notice of Cancellation or Nonrenewal" as a result of non-payment. . . . After each of these notices, the employer made the required payments and the policies continued uninterrupted. On August 27, 2001 another such notice was sent to Northbound Train demanding a payment of $4,485.00 on or before September 17, 2001 in order to avoid cancellation of the policy. Patrick Sullivan, the president of the insured corporation, acknowledged that he received the August 27, 2001 Notice of Cancellation. As a result, Mr. Sullivan's wife issued a check in the amount of $4,485.00 dated September 12, 2001, and forwarded the check to Eastern. After receiving the check Eastern issued a letter dated September 17, 2001 reinstating the policy. Mr. Sullivan acknowledged receiving the letter of re[in]statement but credibly denied receiving any further notices from Eastern Casualty. Subsequent to the issue of the letter of re[in]statement, the check was dishonored by insured's bank. (Eastern's Exhibit 7)
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> In response to the dishonored check Eastern Casualty issued another Notice of Cancellation dated September 27, 2001 now demanding an increased amount of $5,676.00 The notice stated: "To avoid cancellation, the full amount is due by 10/12/2001." (Eastern's Exhibit 1) I credit Mr. Sullivan's testimony that he never received the September 27, 2001 Notice of Cancellation.

(Dec. 9-10.)

The insurer's underwriting manager and the postmaster of the Cambridge Post Office both testified at the hearing. Based on that testimony, the judge found that on September 27, 2001, the insurer presented to the Marlborough Post Office a "certified mail log," listing and assigning item numbers to 282 letters, one of which was addressed to the employer at his correct address. Each page of the log was stamped by the post office on that day, and constituted a "Certificate of

Mailing Receipt" within the meaning of the United States Postal Service Domestic Mail Manual, which provides a record of mailing, but not of delivery. (Dec. 11-12.) Although the underwriting manager testified that a so-called "green card" (a return receipt for certified mail which would provide the insurer with a record of delivery or attempted delivery) was affixed to each envelope brought to the post office on September 27, 2001, the insurer could not locate in its file the return receipt for the employer's letter. The insurer attempted to trace the particular letter mailed to the employer, and on February 7, 2002, the Marlborough Post Office certified that the letter had entered into the postal stream at the Marlborough facility on September 27, 2001. However, on February 22, 2002, the Cambridge Post Office (through which the letter to the employer would have to pass) certified that there was no hard copy or electronic record of the letter ever being received at that facility. (Dec. 12-13.) The judge concluded that the Cambridge Post Office never received the letter, and therefore neither delivered nor attempted to deliver the cancellation notice to the employer. (Dec. 13-14.)

Nevertheless, the judge found that the insurer had fulfilled the notification requirements of c. 175, § 187C, by forwarding the cancellation notice by first class mail, postage pre-paid, to the employer's proper address, and by obtaining a certificate of mailing receipt. The judge concluded: "The plain language of the statute does not require actual receipt of notice by the insured. I find that the policy was properly terminated by the insurer as of the date of termination contain[ed] in the Notice of Cancellation dated September 27, 2001, that is, October 12, 2001." (Dec. 16.) [4] Finally, the judge found that the September 27,

[4] The judge also addressed the effect of the prior cancellation notice dated August 27, 2001, and the insurer's subsequent reinstatement letter dated September 17, 2001. Without discussing the import of the employer's check being returned for insufficient funds after the reinstatement notice was issued, the judge found that the insurer's demand, in the September 27, 2001 cancellation notice, for payment of $5,676, almost $1,200 more than the payment demanded in the August cancellation notice, was an assertion that the policy had remained in effect after the September 17, 2001

2001 notice of cancellation was clear and unambiguous. It stated that if the premium amount due was not paid by October 12, 2001, the policy would lapse. (Dec. 16.)

The judge determined that the insurer had "complied with all requirements of the statute to effect cancellation of the policy in question," effective October 12, 2001, approximately one month before the employee was injured. (Dec. 16, 17.) He denied and dismissed all claims against the insurer, and ordered the Trust Fund to pay the employee § 34 temporary total incapacity benefits, commencing on December 29, 2001, and medical benefits under §§ 13 and 30, for his November 11, 2001 industrial injury.

The Trust Fund first argues that the insurer's cancellation was ineffective because the employer did not receive the September 27, 2001 cancellation notice. Citing Cuzzi v. The Ice Box, 11 Mass. Workers' Comp. Rep. 443 (1997), the Trust Fund argues that the so-called "mailbox rule" applies to cancellation of workers' compensation insurance policies. That rule provides that, "[a] properly addressed letter with prepaid postage, deposited in the U.S. mail, is presumed to have reached its addressed destination. This prima facie evidence of receipt, once countered by evidence of non-delivery, creates an issue of fact for the administrative judge to decide." Id. at 446, n.4. The Trust Fund contends that in this case, such prima facie evidence of receipt was clearly rebutted.

The Trust Fund's reliance on Cuzzi is misplaced. Cuzzi and other cases applying the "mailbox rule" involved cancellations of "assigned risk" policies

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reinstatement notice. He thus found that the insurer was required to follow statutory cancellation procedures to cancel the policy thereafter. (Dec. 14.)

pursuant to G. L. c. 152, § 65B.[5] See also Fontaine v. Evergreen Constr.Co., 13 Mass. Workers' Comp. Rep. 62, 66 (1999). Under the plain language of § 65B, receipt of the cancellation notice by the employer is required. See Armstrong v. Town and Country Carpentry, 10 Mass. Workers' Comp. Rep. 516, 522 (1996), aff'd *sub nom.* Armstrong's Case, 47 Mass. App. Ct. 693 (1999); Fontaine, supra at 66. The policy here was not an assigned risk policy, but one issued voluntarily by the insurer. As we observed in Armstrong, supra at 522, assigned risk policies pursuant to § 65A are more closely regulated by § 65B than are the standard compensation policies, such as we have here, cancellation of which is governed by § 63. In fact, there is no statutory requirement within chapter 152 requiring notice to the employer of cancellation of a voluntary policy. Section 63 requires notice only to the rating organization authorized by § 52C ten days prior to cancellation.[6]

Where a policy is voluntarily issued, we must look to the policy itself and to G. L. c. 175, § 187C, for the employer notice requirements to effect cancellation or termination. See Fontaine, supra at 65(c. 175, § 187C, applies in workers'

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[5] General Laws c. 152, § 65B, as amended by St. 1991, c. 398, § 90A, provides:

> If, after the issuance of a policy under section sixty-five A, it shall appear that the employer to whom the policy was issued is not or has ceased to be entitled to such insurance, the insurer may cancel or otherwise terminate such policy in the manner provided in this chapter, provided, however, that any insurer desiring to cancel or otherwise terminate such a policy shall give notice in writing to the rating organization and the insure[d] of its desire to cancel or terminate the same. Such cancellation or termination[] shall be effective unless the *employer*, within ten days after the *receipt* of such notice, files with the department's office of insurance objections thereof . . . .

(Emphasis added.)

[6] General Laws c. 152, § 63, as amended by St. 2002, c. 279, § 3, provides, in relevant part:

> Such insurance shall not be cancelled or shall not be otherwise terminated until ten days after written notice of such cancellation or termination is given to the rating organization or until a notice has been received by said organization that the employer has secured insurance from another insurance company or has otherwise insured the payment of compensation provided for by this chapter.

compensation cases); Dembitzski v. Metro Flooring, Inc., 13 Mass. Workers' Comp. Rep. 348, 355 (1999)(same).[7] That statute provides that notice "forwarded to [the insured's address] by first class mail, postage prepaid, . . . *shall be deemed a sufficient notice*," provided that "[n]o written notice of cancellation shall be deemed *effective when mailed* by the company *unless* the company obtains a certificate of mailing receipt from the United States Postal Service showing the name and address of the insured stated in the policy." (Emphasis added.)

In construing a statute, " 'its words must be given their plain and ordinary meaning according to the approved usage of language . . . and . . . the language of the statute is not to be enlarged or limited by construction unless its object and plain meaning require it.' " Taylor's Case, 44 Mass. App. Ct. 495, 499 (1998), quoting Johnson's Case, 318 Mass. 741, 746-747 (1945). In Taylor, the court held that the word "shall", as used in § 35B ("An employee . . . shall . . . be paid such compensation at the rate in effect at the time of the subsequent injury") was plain and unambiguous, and mandatory in nature. The language of c. 175, § 187C, is likewise plain and unambiguous, and its words are similarly "mandatory, not precatory." Id. See also Piekarski v. National Non-Wovens, 16 Mass. Workers' Comp. Rep. 254, 258 (2002), quoting Hashimi v. Kalil, 388 Mass. 607, 609 (1983)(" 'The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation.' ") Thus, mailing of the notice, such as occurred here,

[7] General Laws c. 175, § 187C, applies to assigned risk as well as voluntary policies, mandating in the case of assigned risk policies, that the cancellation notice be sent by certified mail. Dembitzski, supra at 355. However, since c. 152, § 65B, specifically applies to assigned risk policies, whereas c. 175, § 187C, governs insurance policies in general, § 65B's requirement of receipt by the employer takes precedence over the mailing requirement of § 187C. See Murphy v. Cowperthwaite, 18 Mass. Workers' Comp. Rep. 102 (2004); Archer v. Turner Trucking & Salvage, 10 Mass. Workers' Comp. Rep. 166, 174 (1996)(specific statute prevails over general statute where two cannot be harmonized).

"shall be deemed sufficient notice" of cancellation as long as the insurer obtains a certificate of mailing receipt.[8]

We have found no cases construing the statutory requirements for notice to the insured set forth in G. L. c. 175, § 187C. However, the cases interpreting the notice requirements of G. L. c. 175, § 113A, regarding cancellation of compulsory motor vehicle liability policies, support our construction of § 187C. Interpreting language similar to § 187C,[9] the courts have held that "the sufficiency of a statutory notice of cancellation under § 113A(2) must be measured as of the time of mailing in the manner required by that section, because mailing satisfies the statutory notice requirement, regardless of actual receipt by the addressee." Liberty Mut. Ins. Co. v. Wolfe, 7 Mass. App. Ct. 263, 265 (1979). Accordingly, we affirm the judge's finding that the policy was effectively cancelled by the

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[8] In contrast to the provision in c. 175, § 187C, making mailing sufficient notice when accompanied by a certificate of mailing receipt, is another provision making an "*affidavit* of any officer, agent or employee of the company . . . that such notice has been served . . . as provided in this section . . . *prima facie evidence* that cancellation has been duly effected." As prima facie evidence of cancellation, an affidavit could be rebutted, whereas the production of the certificate of mailing receipt "shall be deemed a sufficient notice" under c. 175, § 187C, and is therefore, not rebuttable. " '[W]henever possible, we [must] give meaning to each word in the legislation; no word in a statute should be considered superfluous.' " Murphy, supra, quoting Petrucci v. Bd. of App. of Westwood, 45 Mass. App. Ct. 818, 823 n.8 (1998), quoting International Org. of Masters, Mates & Pilots, Atl. & Gulf Maritime Region, AFL-CIO v. Woods Hole, Martha's Vineyard & Nantucket S.S. Authy., 392 Mass. 811, 813 (1984). To construe c. 175, § 187C, to mean that not only an affidavit, but also a certificate of mailing receipt, was rebuttable prima facie evidence, would render the mandatory language of the statute surplusage, a result we will not condone.

[9] General Laws c. 175, § 113A, as amended by St. 1933, c. 119, § 1, provided, in relevant part:

> [N]otice of cancellation sent by the company to the insured, by registered mail, postage prepaid, with a return receipt of the addressee requested, addressed to him at his residence or business address stated in the policy *shall be a sufficient notice*.

(Emphasis added.) Amendments to § 113A after 1933 but prior to the holding in Liberty Mutual v. Wolfe, supra, did not affect this provision.

mailing of the notice to the employer's correct address by first class mail, postage pre-paid, where a certificate of mailing receipt had been obtained.

The Trust Fund next argues that even if the employer had received the September 27, 2001 notice from the insurer, it did not express the clear and unambiguous "desire to cancel or terminate" required by § 65B, because it was a bill with an invitation to continue coverage at a stated premium. (Trust Fund br. 15.) In support of this argument, the Trust Fund cites Dearmon's Case, 58 Mass. App. Ct. 913 (2003). In Dearmon, the insurer sent the employer a letter, by regular mail, stating the amount of the renewal premium, and further stating that "if payment is not received by the due date, *either* the policy will be issued with a lapse in coverage *or* your premium check will be returned and no policy will be issued." Id. at 913. (Emphasis added.) The court held:

> [T]he offer to renew sent to the employer was not the unequivocal notice of "desire to cancel or terminate" called for by § 65B. . . . In view of the purpose of that section, to "allow the department to know with certainty whether an employer is insured," Cummings's Case, [52 Mass. App. Ct. 444, 450 (2001)], citing Frost v. David C. Wells Ins. Agency, Inc., [14 Mass. App. Ct. 305, 309 (1982)], it is doubtful that any notice complying with § 65B could be framed and sent prior to the date it could be known whether the renewal offer was accepted.

Id. at 914.

The Trust Fund's argument hits wide of the mark. Dearmon is distinguishable, as it concerned the more stringent notice requirements under § 65B for cancellation of an assigned risk policy, see footnote 5 supra. It also addressed statutory language far more ambiguous and confusing than that at issue here. The September 27, 2001 notice (Ins. Ex. 1) stated that "cancellation or termination will take effect at 10/12/2001," and further that "[y]ou are hereby notified in accordance with the terms and conditions of the above mentioned policy that your insurance will cease at and from the hour and date mentioned above due to nonpayment of premium." Other parts of the notice challenged by the Trust Fund read: "To avoid cancellation, the full amount is due by

10/12/2001," and "[t]o rescind the above cancellation notice, $5,676.00 must be received in our office by 10/12/2001." The Trust Fund's contention that the language of this notice is unclear and ambiguous is wholly without merit. We think the language gave the employer abundantly clear notice that the policy would be cancelled unless the premium was paid as of the date specified. We affirm the judge's finding to that effect. The judge's conclusion that the Trust Fund, and not the insurer, was liable for payment of workers' compensation benefits for the employee's injury is amply supported by his subsidiary findings of fact, and is correct as a matter of law. What benefits were due the employee is another matter.

The Medical Evidence Issue

The Trust Fund had raised § 1(7A)[10] as a defense to the employee's claim, arguing that any ongoing disability beyond the date of the impartial medical examination was not related to the employee's 2001 right knee injury,[11] but rather to his old anterior cruciate ligament tear and surgery. (Dec. 3, 8.) Although neither party moved for such relief, the judge sua sponte invited additional medical evidence for the so-called "gap period" prior to the § 11A impartial

[10] General Laws c. 152, § 1(7A), provides, in relevant part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[11] At hearing, the Trust Fund stipulated that the employee suffered an industrial injury on November 11, 2001. (January 30, 2003 Tr. 4; Trust Fund's Issues Statement.) Eastern Casualty did not join in that stipulation. (January 30, 2003 Tr. 3; Eastern's Issues Statement.)

medical examination.[12] Only the employee offered such evidence. (Dec. 4.)

The judge noted and adopted Dr. Foster's opinion that "[t]here is no evidence whatsoever that the patient's surgery 18 years prior contributed to this injury nor is [in] any way ca[us]ally related." (Dec. 8, quoting Employee Ex. 2.) The judge found that the November 11, 2001 industrial injury was "the"[13] major cause of the employee's ongoing incapacity and need for medical care. (Dec. 8-9.)

We agree with the Trust Fund that that the judge's finding of ongoing total incapacity causally related to the employee's 2001 right knee injury is without evidentiary support. There is no expert medical opinion that the 2001 work injury remained a major cause of the employee's disability, as required under § 1(7A), at least as of the date of the impartial medical examination.

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[12] The judge memorialized his allowance of additional medical evidence in a letter dated August 12, 2003 to the parties, which is contained in the Board file. Having reviewed the letter, as we are permitted to do, Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002), we note that the judge did not expressly declare the impartial medical report to be inadequate, or the medical issues complex, one of which findings must precede the allowance of additional medical evidence. See § 11A(2). He merely invited "medical evidence relative to the employee's disability, prior to the impartial physician's examination on August 12, 2002 concerning both the extent of disability and causal relationship in light of a 1(7A) pre-existing condition." (August 12, 2003 letter from administrative judge to parties.) Ultimately, the judge found that Dr. Bienkowski "did not comment on the relationship, if any, between the prior injury and [the employee's] current disability." (Dec. 8.) Even if this suffices as a finding of inadequacy, the parties were entitled to that finding before the filing of the decision. (Dec. 8.)

Moreover, the judge's allowance of additional medical evidence on the issue of disability during the pre-impartial examination period is questionable, as Dr. Bienkowski opined that the employee's disability, causally related to the work-related meniscal injury, would have lasted for six weeks following the March 29, 2002 surgery, and that he should return to his base line function within three months. "If he cannot return to baseline, it will be related to pre-existing problems from an old anterior cruciate tear." (Statutory Ex., August 12, 2002 Bienkowski report, 3.) See Mims v. M.B.T.A., 18 Mass. Workers' Comp. Rep. 96 (2004)(sua sponte allowance of "gap" medical without appropriate analysis as to whether § 11A physician's opinion adequately addresses that period of disability highly disfavored). However, as the Trust Fund has advanced no argument on either of these issues, we deem them waived.

[13] The correct standard under § 1(7A) is "a" major cause, not "the" major cause.

We first consider the § 11A impartial medical opinion of Dr. Bienkowski. His report clearly indicates that the employee's pre-existing right knee problems combined with his 2001 work injury to cause or prolong his disability or need for treatment:

> The displaced bucket handle tear is related to the fall in 2001. The other injuries listed are related to the previous anterior cruciate tear. . . . The reason for the causal relationship . . . is the acute pain after a documented knee injury, a locked knee with swelling on exam, the MRI results, and the operative findings of a displaced bucket handle tear of the medial meniscus. The other findings listed above are related to an old anterior cruciate tear. With or without repair, the probability of lateral meniscal tears, patellar arthrosis, and femoral condylar changes is 100 percent with time. These changes are well documented to occur after an anterior cruciate injury. *The changes noted in the operative are far advanced and could not occur in the short period of time between the injury and the arthroscopic procedure.*
>
> Presently the employee is medically disabled. This disability is partial and temporary. *The recovery from arthroscopic surgery for a meniscal tear is usually 6 weeks. The other problems listed above are slowing his recovery. He should eventually be back at his base line function. In my experience, this is within 3 months for most patients in this situation. If he cannot return to baseline, it will be related to pre-existing problems from an old anterior cruciate tear.*

(Statutory Ex., August 12, 2002 Bienkowski report, 2-3.) (Emphasis added.)

Dr. Bienkowski's opinion certainly establishes the combination prerequisite of § 1(7A), but it falls far short of meeting the employee's burden of proving that his 2001 work injury remained a major cause of his ongoing disability at the time of the impartial medical examination. As the employee was then almost five months post-arthroscopy, Dr. Bienkowski's opinion cannot be construed to mean other than that the employee's testified to failure to return to his baseline was related to his pre-existing right knee problems, and not the industrial accident of November 11, 2001. (See footnote 12, supra.)

Indeed, the judge did not rely on Dr. Bienkowski's report to find ongoing causal relationship. (Dec. 8.) Instead, he used the records of the employee's

treating physician, Dr. Timothy Foster, to "find that the November 11, 2001 industrial injury is the major cause of the employee[']s ongoing disability and need for medical care." (Dec. 8-9.) The judge erred in using Dr. Foster's reports to find ongoing disability and causation under § 1(7A) after the impartial medical examination, as both reports predated by several months that examination. Neither Dr. Foster's April 4, 2002 report, (Employee Ex. 2), nor his May 28, 2002 "out of work" note, (Employee Ex. 3), supports the judge's findings that the employee remained totally disabled on August 12, 2002, the date of the impartial medical examination, and that his work injury remained "a major" cause of that disability.[14]

Beyond his misconstruction of Dr. Foster's opinions, it was error for the administrative judge, for the first time in his decision and *without prior notice* to the parties, to expand the use of Dr. Foster's reports to address the issue of ongoing disability and causation under § 1(7A) after the "gap" period. Mims, supra at 100-101; Behre v. General Elec. Co., 17 Mass. Workers' Comp. Rep. 273, 277 (2003); Gulino v. General Elec. Co., 15 Mass. Workers' Comp. Rep. 378, 380-381 (2001). Doing so foreclosed the parties' right "to fully address the medical issues by presenting further medical evidence of their own choosing and/or cross-examining expert witnesses." Akoumianakis v. Stadium Auto Body, Inc., 17 Mass. Workers' Comp. Rep. 385, 389 (2003), citing Gulino, supra at 381. See also O'Brien's Case, 424 Mass. 16, 23 (1996).

[14] The April report certified that the employee then remained totally disabled, and the May note stated that he was to remain "out of work until further evaluation on June 28, 2002." (Employee Exs. 2 and 3.) Neither "opinion" can be said to satisfy the employee's burden of proving total disability ongoing from August 12, 2002. As to the employee's burden under § 1(7A), Dr. Foster's opinions are likewise insufficient. Although the doctor stated that "[t]here is no evidence whatsoever that the patient's surgery from 18 years prior contributed to this injury nor is [in] any way causally related," he also stated that "the previous knee surgery may prolong the patient's rehabilitation; however, I do not expect that this will be for a significant period of time." (Employee Ex. 2.)

The employee had the burden of proving each and every element of his claim. Taylor v. USF Logistics, Inc., 17 Mass. Workers' Comp. Rep. 182, 185 (2003), citing Sponatski's Case, 220 Mass. 526 (1915). Once the Trust Fund raised § 1(7A) and satisfied its burden of producing evidence -- the § 11A impartial medical report -- that those statutory provisions applied to the employee's claim, Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 82 (2000), the employee was required to prove that his work-related right knee injury of November 11, 2001 remained a major cause of his claimed disability from December 29, 2001 and continuing. Lyons v. Chapin Ctr., 17 Mass. Workers' Comp. Rep. 7, 10 (2003). The employee's medical evidence for the gap period prior to Dr. Bienkowski's examination falls short of meeting that burden, see footnote 15, supra, and the judge erred in adopting it. However, the Trust Fund generously concedes that the "[t]he medical evidence does support an acute injury to the knee with a closed period of disability through May 2002," and "acknowledges that the impartial report is open to interpretation that would permit an even longer period of disability." (Trust Fund br. 19.)

Accordingly, we affirm the judge's finding that the employee sustained a compensable right knee injury on November 11, 2001, and the award of § 34 and medical benefits against the Trust Fund from December 29, 2001 to August 12, 2002, the date of the impartial medical examination. However, we reverse the judge's finding of total incapacity and § 1(7A) major causation after that date, and vacate the award of ongoing incapacity and medical benefits.

Pursuant to § 13A(6), employee's counsel is awarded a fee of $1,312.21.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **December 8, 2004**